Supreme Court, U.S.
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No. 98 - 131

IN THE

Supreme Court of the United States

October Term, 1997

UNITED STATES OF AMERICA,

Petitioner,

v.

SUN-DIAMOND GROWERS OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

DONALD C. SMALTZ*
Independent Counsel
ROBERT W. RAY
Deputy Independent Counsel
CHARLES M. KAGAY
STEPHEN R. McALLISTER
GEORGE D. BROWN
JOSEPH P. GUICHET

OFFICE OF INDEPENDENT COUNSEL
103 Oronoco Street, Suite 200
Alexandria, VA 22314
(703) 706-0010
Counsel for Petitioner

*Counsel of Record

RICHARD A. HIBEY*
ERIC W. BLOOM
CHARLES B. KLEIN

WINSTON & STRAWN
1400 L Street, N.W.
Washington, DC 20005
(202) 371-5700
Counsel for Respondent

PETITION FOR CERTIORARI FILED JULY 21, 1998
CERTIORARI GRANTED NOVEMBER 2, 1998

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Pursuant to Supreme Court Rule 26, the Joint Appendix does not reproduce the following relevant documents already before the Court:

From the Appendix to the Petition for Writ of Certiorari ("Pet. App."):

United States v. Sun-Diamond Growers of California, 138 F.3d 961 (D.C. Cir. 1998) ..... Pet. App 1

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Relevant Docket Entries From District Court

6/13/96 INDICTMENT filed against SUN-DIAMOND GROWERS OF CALIFORNIA (1) count(s) 1-2, 3-4, 5, 6-9 (mln) [Entry date 06/14/96]

6/27/96 ARRAIGNMENT held before Judge Ricardo M. Urbina as to SUN-DIAMOND GROWERS (1) count(s) 1-2, 3-4, 5, 6-9: Plea of not guilty entered by attorney Richard Hibey on behalf of defendant SUN-DIAMOND GROWERS (1) as to count(s) 1-2, 3-4, 5, 6-9; Status hearing set for 10:00 AM on 8/5/96; Trial (2.5 weeks) set for 10:00 AM on 9/9/96 for SUN-DIAMOND GROWERS Reporter: William McAllister (kk) [Entry date 07/03/96]

7/23/96 MOTION filed by defendant SUN-DIAMOND GROWERS to dismiss indictment as to count(s) 1-2, 3-4, 5, 6-9; Exhibits (5) (kk) [Entry date 07/25/96]

8/5/96 RESPONSE by plaintiff USA in opposition to motion by defendant SUN-DIAMOND GROWERS to dismiss indictment as to count(s) 1-2, 3-4, 5, 6-9 [9-1]; Exhibits (2) (kk) [Entry date 08/06/96]

8/12/96 REPLY MEMORANDUM by defendant SUN-DIAMOND GROWERS in support of its motion to dismiss indictment as to count(s) 1-2, 3-4, 5, 6-9 [9-1] (kk) [Entry date 08/15/96]

9/5/96 MOTIONS HEARING before Judge Ricardo M. Urbina as to SUN-DIAMOND GROWERS: Motion by defendant SUN-DIAMOND GROWERS (1) in limine to preclude the Independent Counsel from using certain summary charts at trial, granted; Motion by USA to allow leading questioning of SUN-DIAMOND witnesses in the Government's case-in-chief [35-1], denied; Motion by USA to exclude SUN-Diamond's reliance on advice by counsel defense [37-1], or in the alternative, to

require SUN-DIAMOND to produce all documents relating to such defense [37-2], denied; Motion by USA to compel production of reciprocal discovery materials [39-1], or in the alternative, to preclude any reference to such materials at trial [39-2]; granted; Motion by USA to admit summary charts at trial [40-1] and to permit the use of those charts during the opening statement [40-2], taken under advisement; Motion by defendant SUN-DIAMOND GROWERS (1) to dismiss indictment as to count(s) 1-2, 3-4, 5, 6-9 [9-1], denied. Reporter: William D. McAllister (kk) [Entry date 09/11/96]

9/9/96 USA's PROPOSED JURY INSTRUCTIONS TO WHICH DEFENDANT SUN-DIAMOND GROWERS HAS NOT AGREED, FOLLOWED BY DEFENDANT'S OBJECTIONS (kk) [Entry date 09/16/96] [Edit date 09/16/96]

9/9/96 NOTICE OF FILING by USA of Defendant's proposed jury instructions to which the Government has not agreed, followed by the Government's objections (kk) [Entry date 09/16/96]

9/9/96 NOTICE OF FILING by USA as to SUN-DIAMOND GROWERS of Proposed Jury Instructions upon which the parties have agreed (kk) [Entry date 09/16/96]

9/9/96 MEMORANDUM OPINION AND ORDER by Judge Ricardo M. Urbina as to SUN-DIAMOND GROWERS: denying motion by defendant SUN-DIAMOND GROWERS to dismiss count(s) 1-2, 3-4, 5, 6-9 of the indictment [55-1] (N) (kk) [Entry date 09/16/96][1]

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[1] The official docket incorrectly states that this order denied Sun-Diamond Growers' motion to dismiss counts 5 and 6-9. The parties agree that this order addressed counts 1 through 9. The entry above has been corrected accordingly.

9/24/96 JURY TRIAL before Judge Ricardo M. Urbina as to SUN-DIAMOND GROWERS (1) count(s) 1-2, 3-4, 5, 6-9: Same jury. Deliberations resumed and concluded. Verdict of guilty rendered as to SUN-DIAMOND GROWERS (1) count(s) 1, 3-4, 5, 6-9. Sentence set for 9:00 12/10/96 for SUN-DIAMOND GROWERS . , Verdict of not guilty rendered as to SUN-DIAMOND GROWERS (1) count(s) 2 . , SUN-DIAMOND GROWERS referred for pre-sentence investigation report, Defendant given until 10/14/96 to file post-trial motions, oppositions due 10/25/96, replies due 10/30/96. Reporter: William D. McAllister (mlp) [Entry date 09/26/96]

10/10/96 TRANSCRIPT filed as to SUN-DIAMOND GROWERS for date of 9/18/96. Reporter: William McAllister (mln) [Entry date 10/11/96]

10/21/96 TRANSCRIPT (Excerpt) of jury trial before Judge Urbina filed as to SUN-DIAMOND GROWERS for date of 9/17/96. Reporter: William D. McAllister (Volume 7) (kk) [Entry date 10/22/96]

5/28/97 NOTICE OF APPEAL filed by defendant SUN-DIAMOND GROWERS from Court's oral sentence imposed on 5/13/97 and entered on 5/19/97. Appeal references SUN-DIAMOND GROWERS (1), count(s) 1, 3-4, 5, 6-9. Counsel and defendant(s) notified. Docketing statement not received. (Blank Docketing Statement mailed to defense counsel) USCA fee: $100.00 USDC fee: $5.00 (kk) [Entry date 06/02/97]

6/5/97 JUDGMENT and Probation Order issued by Judge Ricardo M. Urbina as to SUN-DIAMOND GROWERS. (mlp) [Entry date 06/06/97]

Relevant Docket Entries From Circuit Court

6/6/97 CRIMINAL CASE docketed. Notice of Appeal filed by Appellant Sun Diamond Growers. [277008-1] (jth)

9/15/97 BRIEF filed by Appellant Sun Diamond Growers [296499-1]. Copies: 15. Certificate of service date 9/15/97. (lej)

9/15/97 BRIEF lodged by Movant-Amicus Amer Leag Lobbyists [296557-1] Copies: 15. Certificate of service date 9/15/97. (wmw)

10/16/97 CORRECTED BRIEF filed by Appellee USA [303230-1]. Copies: 16. Certificate of service date 10/16/97. (jth)

10/29/97 REPLY BRIEF filed by Appellant Sun Diamond Growers [306660-1]. Copies: 15. (Certificate of personal service dated 10/29/97). (jth)

12/11/97 ORAL ARGUMENT HELD before Williams, Henderson, Tatel. (sgh)

12/19/97 TRANSCRIPT of oral argument held on 12/11/97. [277005-1] (jth)

3/20/98 JUDGMENT for the reasons in the accompanying opinion reversing and remanding for a new trial on Count I [339408-1], affirming the convictions on Counts III - IX [339408-2], vacating Sun-Diamond's sentence [339408-3], and remanding case to the USDC for further proceedings consistent with the opinion filed this date [339408-4]. Before Judges Williams, Henderson, Tatel. (edb)

3/20/98 OPINION (30 pgs) for the Court filed by Judge Williams. (edb)

5/4/98 PETITION for rehearing [350207-1], SUGGESTION for rehearing in banc [350208-2] (20 copies) filed by Sun Diamond Growers (certificate of service dated 5/4/98) (jth)

5/4/98 PETITION for rehearing [350208-1], SUGGESTION for rehearing in banc [350208-2] (19 copies) filed by Appellee USA. (certificate of service dated 5/4/98) (jth)

5/6/98 CLERK'S ORDER filed directing appellant to file a response [350595-1] to the petition/suggestion for rehearing in banc of the USA [350208-1] and do so on or before May 21, 1998. (jth)

5/21/98 RESPONSE filed [354167-1] by Appellant Sun Diamond Growers to Appellee's Petition for Rehearing and Suggestion for Rehearing in Banc (certificate of service dated 5/21/98). (jth)

6/18/98 PER CURIAM ORDER filed denying the petitions for rehearing of appellant [350207-1], and appellee [350208-1], filed on May 4, 1998. (Mandate may issue on or after 6/26/98). Before Judges: Williams, Henderson, and Tatel. (jth)

6/18/98 PER CURIAM ORDER, In Banc, filed denying appellant's suggestion for rehearing in banc [350207-2]. Before Judges Edwards, Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel, Garland. [Circuit Judges Sentelle and Garland did not participate in this matter]. (jth)

6/18/98 PER CURIAM ORDER, In Banc, filed denying appellant's suggestion for rehearing in banc [350208-2]. Before Judges Edwards, Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel, Garland. [A statement of Circuit Judge Wald concurring in the denial of rehearing in banc is attached]. [Circuit Judges Sentelle and Garland did not participate in this matter]. (jth)

7/17/98 PER CURIAM ORDER filed amending opinion filed on 3/20/98 by Circuit Judge Stephen F. Williams [339409-1]. SEE ORDER FOR DETAILS. Before Judges Williams, Henderson, Tatel. (edb)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Grand Jury Sworn in on January 6, 1995
Holding a Criminal Term

INDICTMENT

Criminal No. 96-0193

UNITED STATES OF AMERICA,

v.

SUN-DIAMOND GROWERS OF CALIFORNIA,

Defendant.

Violations:

18 U.S.C. 201(c)(1)(A)
(Gratuity)

18 U.S.C. §§ 1343, 1346
(Wire Fraud)

2 U.S.C. § 441b(a)
(Corporate Campaign Contribution)

2 U.S.C. § 441f
(Conduit Campaign Contribution)

18 U.S.C. §
(Aiding and Abetting)

THE GRAND JURY CHARGES:

COUNT ONE

I. INTRODUCTION

At all times material to this Indictment:

1. Defendant SUN-DIAMOND GROWERS OF CALIFORNIA (hereafter defendant SUN-DIAMOND) was a California agricultural cooperative corporation. Defendant SUN-DIAMOND's principal offices were in Pleasanton, California.

2. Defendant SUN-DIAMOND was owned by five member cooperatives which, in turn, were owned by a total of approximately 4,500 growers. The five member cooperatives, who are not named as defendants in this indictment, were:

A. Sun-Maid Growers of California;

B. Diamond Walnut Growers, Inc.;

C. Sunsweet Growers, Inc.;

D. Valley Fig Growers; and

E. Hazelnut Growers of Oregon.

3. Defendant SUN-DIAMOND and its member cooperatives grew, processed, packaged, marketed and sold, among other products, raisins, walnuts, prunes, figs, and hazelnuts. Each member cooperative was the largest producer of commodities in its respective industry.

4. Defendant SUN-DIAMOND assisted the member cooperatives primarily by handling their marketing and dealing with federal agencies in Washington, D.C., such as the United States Department of Agriculture. Defendant SUN-DIAMOND pursued matters of importance to SUN-DIAMOND with the Department of Agriculture and Secretary of Agriculture Alphonso Michael Espy (hereafter Secretary of Agriculture Michael Espy), not named as a defendant herein.

5. SUN-DIAMOND Senior Corporate Officer X, whose identity is known to the Grand Jury, but is not named as a defendant in this Indictment, was, on behalf of SUN-DIAMOND and the member cooperatives, in charge of and responsible for, among other things:

A. Dealing with the Secretary of Agriculture and decision makers at the Department of Agriculture; and

B. Directing SUN-DIAMOND's federal government lobbying activities and representatives, which included James H. Lake, not named as a defendant herein;

6. The United States Department of Agriculture was a department of the United States Government. The duties of the Department of Agriculture were and are, among other things, to improve and promote agricultural development and production in the United States and the promotion of United States agricultural products in other countries. The Secretary of Agriculture was and is in charge of the Department of Agriculture.

7. In or about December 1992, President-Elect William Jefferson Clinton advised Michael Espy that he would nominate him to be the Secretary of Agriculture. From that time forward, Michael Espy became subject to the provisions of federal law which, in part and among other things, made it unlawful for companies such as defendant SUN-DIAMOND to give things of value to Michael Espy for and because of official acts performed or to be performed by him.

8. On or about January 14, 1993, the United States Senate Committee on Agriculture, Nutrition and Forestry considered the nomination of Michael Espy to be Secretary of Agriculture. Michael Espy was confirmed by the United States Senate on January 21, 1993. Michael Espy served as the Secretary of Agriculture from January 22, 1993 until December 31, 1994.

II. SUN-DIAMOND ISSUES INVOLVING THE DEPARTMENT OF AGRICULTURE

9. In 1993 and 1994, defendant SUN-DIAMOND and its member cooperatives had questions, matters, and issues pending with the Department of Agriculture and Secretary of Agriculture Michael Espy. In part these included:

A. MARKET PROMOTION PROGRAM

10. During 1993 and 1994, the Department of Agriculture administered a grant program designed to increase export sales of certain U.S. agricultural commodities abroad, including prunes, raisins, and walnuts. This program was and is known as the Market Promotion Program ("MPP").

11. In part and among other things, under the MPP, the Department of Agriculture, acting through the Secretary of Agriculture, was authorized to award government funds to trade organizations, if the Secretary of Agriculture determined that such organizations would significantly contribute to the sale of United States farm commodities in foreign countries.

12. To receive money to market their commodities in foreign countries, trade organizations submitted marketing plan applications to the Department of Agriculture. By law, the Secretary of Agriculture had to approve the award of MPP money to each trade organization. The trade organizations would in turn award money to companies, like the member cooperatives of defendant SUN-DIAMOND, to pay for part of their marketing campaigns in foreign countries.

13. Since the inception of the MPP program, the major SUN-DIAMOND member cooperatives applied for and obtained MPP money from trade organizations in which they participated. Each of the defendant SUN-DIAMOND member cooperatives was the largest member of its respective trade organization.

1994 MPP Allocations

14. The ability and capability to sell raisins, prunes, and walnuts abroad was of substantial importance to defendant SUN-DIAMOND member cooperatives.

15. During May 1994, the Department of Agriculture allocated $2,180,000 to the California Prune Board, the trade organization that administered MPP funds for prunes, $3,520,000 to the Raisin Administrative Committee, the trade organization that administered MPP funds for raisins, and $2,890,000 to the California Walnut Commission, the trade organization that administered MPP funds for walnuts. A portion of MPP funds to each trade organization was dedicated to the sale of brand name commodities such as Sun-Maid raisins, or Sunsweet prunes, and the remainder was dedicated to advertising such commodities generally.

16. During 1994, the California Walnut Commission dedicated $45,941 to the marketing of brand name walnuts. Diamond Walnut Growers received all such brand name dedicated funds, or 100 percent. In 1994, the California Prune Board dedicated $2,362,685 of its MPP funds to the marketing of brand name prune products and Sunsweet Growers received $1,232,000 of such funds, or 52 percent. The Raisin Administrative Committee dedicated $445,750 of its MPP funds to brand name marketing and Sun-Maid Growers received $165,000 of such funds, or 32 percent. The remainder of all such MPP funds was spent on advertising raisins, prunes, and walnuts generally in selected foreign countries, which also benefitted Sun-Maid Growers, Sunsweet Growers, and Diamond Walnut Growers as they sold their products in such countries.

17. Obtaining MPP funds for fiscal year 1994 was a matter of importance to SUN-DIAMOND and its major member cooperatives, Diamond Walnut Growers, Sunsweet Growers, and Sun-Maid Growers of California.

18. In or about April and May 1994, there were questions and matters pending before the Department of Agriculture concerning whether California raisin producers, including Sun-Maid Growers of California, would be able to receive MPP funds because the raisin trade organization to which they belonged and which had applied to USDA for MPP funds would not exist after July 31, 1994.

SUN-DIAMOND Cooperatives and the Definition of Small-Sized Entities

19. Beginning in or about August 1993, by law, the Department of Agriculture was required to develop regulations which gave small-sized entities preference in obtaining certain MPP funds. The Department of Agriculture was deciding whether to include cooperatives in the definition of small-sized entity. If the Department of Agriculture did not consider cooperatives to be small-sized entities, this would result in some defendant SUN-DIAMOND member cooperatives receiving less MPP money.

20. Defendant SUN-DIAMOND wanted Secretary of Agriculture Michael Espy to: (a) cause the Department of Agriculture to promulgate MPP regulations that would allow defendant SUN-DIAMOND member cooperatives to receive the preferences provided for small sized entities, and (b) continue to study the issue with a view to giving cooperatives the preferences due small sized entities.

B. METHYL BROMIDE

21. Methyl Bromide was a chemical that was used to kill pests and other insects when planting orchards and fields. It was also used to kill pests after a commodity was harvested. Certain of defendant SUN-DIAMOND's member cooperatives used methyl bromide for, among other uses, post-harvest fumigation of walnuts, prunes, and figs. Methyl bromide was a low cost, effective pesticide.

22. In 1992, the Environmental Protection Agency had announced plans to promulgate a rule which would phase out and ultimately bar the use of methyl bromide in the United States. This proposed rule included a prohibition of the use of methyl bromide as a fumigant on commodities that were exported by defendant SUN-DIAMOND's member cooperatives to other countries.

23. In 1993 and 1994, defendant SUN-DIAMOND and particularly Diamond Walnut, were concerned that the loss of methyl bromide and lack of a viable alternative for methyl bromide would hurt their ability, among other things, to sell their products. Defendant SUN-DIAMOND sought the assistance of the Department of Agriculture, in part and among other things, to persuade the Environmental Protection Agency to delay promulgating the rule to phase out and eliminate the use of methyl bromide and to mitigate the adverse effects of any such rule, when such rule was formally proposed on or about March 18, 1993.

24. Defendant SUN-DIAMOND also sought to have the Department of Agriculture increase its funding for research for alternatives to methyl bromide in the event that use of methyl bromide were restricted or prohibited.

III. THINGS OF VALUE GIVEN TO SECRETARY OF AGRICULTURE MICHAEL ESPY BY DEFENDANT SUN-DIAMOND

25. From on or about January 5, 1993, through on or about March 11, 1994, defendant SUN-DIAMOND, acting through its Senior Corporate Officer X, spent or caused defendant SUN-DIAMOND to spend approximately $14,287 of SUN-DIAMOND corporate funds in the course of entertaining and providing things of value to Secretary of Agriculture Michael Espy and the Secretary's girlfriend, not named as a defendant herein. Of the total amount spent by defendant SUN-DIAMOND's Senior Corporate Officer X, approximately $5,913 was spent directly on Secretary of Agriculture Michael Espy. The remaining balance of

defendant SUN-DIAMOND money, approximately $8,374, was largely used by Senior Corporate Officer X to pay for the expenses of himself, Secretary of Agriculture Michael Espy's girlfriend, and Senior Corporate Officer X's own girlfriend when Senior Corporate Officer X was entertaining Secretary of Agriculture Michael Espy.

26. Defendant SUN-DIAMOND's Senior Corporate Officer X used a personal credit card or caused defendant SUN-DIAMOND to pay the seller directly to purchase the things of value for Secretary of Agriculture Michael Espy that are referenced in this Count of the Indictment. Senior Corporate Officer X submitted reimbursement requests to SUN-DIAMOND for the cost of the things of value that he provided to Secretary of Agriculture Michael Espy.

27. Defendant SUN-DIAMOND reimbursed Senior Corporate Officer X for all of the money he spent for things of value provided to Secretary of Agriculture Michael Espy in this Count of the Indictment in accordance with defendant SUN-DIAMOND's Policy Statement Number P-3, Expense Control and Reporting, which stated in pertinent part:

> "Entertainment expenses which are reimbursed are those ordinary and necessary costs that employees are required to incur for hospitality extended to individuals in sales promotion and in establishing or maintaining business relationships. These expenditures associated with the active conduct of business are reimbursed only if the entertainment precedes or follows a bona fide business discussion."

A. TICKETS, MEALS AND LIMOUSINES FOR THE UNITED STATES OPEN TENNIS TOURNAMENT

28. On or about September 10, 1993, SUN-DIAMOND Senior Corporate Officer X, Secretary of Agriculture Michael Espy, and their girlfriends traveled from the District of Columbia to New York City to attend the U.S. Open Tennis Tournament.

29. On or about September 11 and September 12, 1993, defendant SUN-DIAMOND, acting through Senior Corporate Officer X, paid approximately $9,183 for tickets, limousines, and meals for Secretary of Agriculture Michael Espy and the Secretary's girlfriend, and for Senior Corporate Officer X and his girlfriend to attend two tennis matches at the U.S. Open Tennis Tournament in Flushing Meadows, New York. Defendant SUN-DIAMOND's Senior Official X spent approximately $2,295 of the $9,183 for tournament tickets, meals, and limousines provided directly to Secretary of Agriculture Michael Espy.

B. LUGGAGE

30. On or about January 20, 1993, defendant SUN-DIAMOND, acting through Senior Corporate Officer X, purchased and gave to Secretary of Agriculture Michael Espy five pieces of Hartmann luggage at a total cost of $2,427 and gave that luggage to Secretary of Agriculture Michael Espy.

C. MEALS AT RESTAURANTS

31. From on or about January 5, 1993, through on or about March 11, 1994, defendant SUN-DIAMOND, acting through Senior Corporate Officer X, spent approximately $2,152 to provide meals and entertainment to Secretary of Agriculture Michael Espy and others at restaurants and at a barbecue. The amount of money defendant SUN-DIAMOND spent for food directly served to Secretary of Agriculture Michael Espy was approximately $665.

D. OTHER THINGS OF VALUE

32. On or about October 28, 1993, November 9, 1993, and January 17, 1994, defendant SUN-DIAMOND, acting through Senior Corporate Officer X, spent or caused defendant SUN-DIAMOND to spend approximately $524 to buy and provide a framed print, packing for the print, and a crystal bowl for Secretary of Agriculture Michael Espy.

33. From on or about January 5, 1993, through on or about March 11, 1994, in the District of Columbia and elsewhere, defendant SUN-DIAMOND, acting through Senior Corporate Officer X, did knowingly, directly and indirectly, give, offer and promise things of value as set forth above, to a public official, namely: Alphonso Michael Espy, the Secretary of Agriculture, and to Alphonso Michael Espy, a person selected to be a public official, namely: the Secretary of Agriculture, for and because of official acts performed and to be performed by Alphonso Michael Espy, otherwise than as provided by law for the proper discharge of official duty.

(In violation of Title 18, United States Code, § 201(c)(1)(A) and Title 18, United States Code, § 2)

THE GRAND JURY FURTHER CHARGES:

COUNT TWO

1. Paragraphs 1 through 24 of Count One of this Indictment are realleged and incorporated by reference as though set forth in full.

2. The International Nut Council was and is composed of growers, handlers, brokers, agents, exporters and others, including Diamond Walnut Growers of California, who work to expand the worldwide consumption of tree nuts. It was important to the International Nut Council to have Secretary of Agriculture Michael Espy speak to its members at their IX World Tree Nut Congress which was to be held May 22-24, 1993 in Athens, Greece.

3. Diamond Walnut Growers of California, a member cooperative of the defendant SUN-DIAMOND, was a member of the International Nut Council. The President of Diamond Walnut was a member of the International Nut Council Executive Committee. Diamond Walnut wanted to

increase its export of walnuts to other countries and, in part, used the International Nut Council to achieve this objective.

4. In or about January 1993, Officer Y of the International Nut Council, whose identity is known to the Grand Jury, but is not a defendant herein, talked to defendant SUN-DIAMOND's Senior Corporate Officer X to have Senior Corporate Officer X help arrange for Secretary of Agriculture Michael Espy to attend and speak at the Athens World Tree Nut Congress.

5. As a result of these discussions, on or about February 9, 1993, the International Nut Council, acting through Senior Corporate Officer X, invited Secretary of Agriculture Michael Espy to speak at the IX World Nut Congress in Athens.

6. On or about April 7, 1993, Secretary of Agriculture Michael Espy wrote to Officer Y of the International Nut Council, in care of defendant SUN-DIAMOND's Senior Corporate Officer X, to advise that Senior Corporate Officer X would be involved in working out the details of Secretary Espy's appearance at the Athens Congress.

7. In or about April 1993, in one or more telephone discussions regarding whether Secretary of Agriculture Michael Espy would attend the World Nut Congress, defendant SUN-DIAMOND's Senior Corporate Officer X suggested to Officer Y of the International Nut Council that the Nut Council provide a first class airplane ticket costing about $7,000, so that Secretary of Agriculture Michael Espy could take his girlfriend to Athens. Officer Y of the International Nut Council agreed to pay the cost of a business class airplane ticket, approximately $3,100, for Secretary of Agriculture Michael Espy's girlfriend.

8. On or about May 13, 1993, in the District of Columbia, SUN-DIAMOND Senior Corporate Officer X gave Secretary of Agriculture Michael Espy's girlfriend approximately $3,100 in cash to pay for the cost of her airplane ticket to Athens.

9. On May 21, 1993 Secretary of Agriculture Michael Espy and his girlfriend flew to Athens, where they attended part of the IX World Tree Nut Congress. Defendant SUN-DIAMOND Senior Corporate Officer X and his girlfriend were also at the Congress as well as a delegation from Diamond Walnut Growers.

10. During this time, defendant SUN-DIAMOND's Senior Corporate Officer X entertained Secretary of Agriculture Michael Espy and Secretary Espy's girlfriend at restaurants in Athens. Secretary Espy and his girlfriend spent May 25, 1993 in Rome and returned to the District of Columbia, on May 26, 1993.

11. On or about July 30, 1993, Officer Y of the International Nut Council caused a wire transfer in the amount of $3,140 to be sent from the International Nut Council's bank in Spain to defendant SUN-DIAMOND's Senior Corporate Officer X's bank account in California, as reimbursement to Senior Corporate Officer X for the cash he had given to Secretary Espy's girlfriend to pay for her airplane ticket.

12. In or about May 1993, in the District of Columbia and elsewhere, defendant SUN-DIAMOND, acting through its Senior Corporate Officer X, did knowingly, directly and indirectly, give, offer and promise a thing of value, namely: approximately $3,100 and the benefit thereof, to a public official, namely: Alphonso Michael Espy, the Secretary of Agriculture, for and because of official acts performed and to be performed by Alphonso Michael Espy, otherwise than as provided by law for the proper discharge of official duty.

(In violation of Title 18, United States Code, §201(c)(1)(A) and Title 18, United State Code, §2)

THE GRAND JURY FURTHER CHARGES:

COUNT THREE

I. INTRODUCTION

1. Paragraphs 1 through 8 of Count One are realleged and incorporated by reference herein as though set forth in full.

2. At all times relevant to Count Three of the Indictment:

II. ROBINSON LAKE SAWYER MILLER

3. James H. Lake, not named as a defendant in this Indictment, was a founding partner of Robinson, Lake, Lerer & Montgomery, Inc., d/b/a "Robinson Lake Sawyer Miller" (hereafter, "RLSM").

4. RLSM's principal place of business was in New York, New York.

5. In addition to its New York operation, RLSM conducted business through its District of Columbia office. This Count concerns the activities of the District of Columbia office of RLSM.

6. James H. Lake was in charge of the District of Columbia office and held the position of chairman of the board of directors of Robinson, Lake, Lerer & Montgomery, Inc.

7. RLSM was owned and controlled by, and was a wholly-owned subsidiary of Bozell Worldwide, Inc. (hereafter "Bozell, Inc."), which in turn was and is owned and controlled by Bozell, Jacobs, Kenyon & Eckhardt, Inc., a Delaware corporation, with its principal place of business in New York, New York.

8. A principal part of RLSM's business was lobbying and public relations, including business related to the Department of Agriculture.

9. Defendant SUN-DIAMOND was one of the most important and oldest agricultural clients of RLSM.

10. In part and among other things, defendant SUN-DIAMOND's Senior Corporate Officer X supervised defendant SUN-DIAMOND's relationship with RLSM and the activities of James H. Lake. Senior Corporate Officer X used an office at RLSM, when he was conducting his business for defendant SUN-DIAMOND in the District of Columbia.

11. RLSM handled, in part, defendant SUN-DIAMOND's public relations and lobbying activities, including representing defendant SUN-DIAMOND's interests before the Department of Agriculture. Defendant SUN-DIAMOND paid RLSM a $20,000 per month retainer, plus expenses.

III. THE HENRY ESPY CAMPAIGN

12. The Federal Election Commission (hereinafter "FEC") was the agency of the United States Government entrusted with responsibility for enforcement of the reporting requirements of the Federal Election Campaign Act, 2 U.S.C.§§431-455 (hereinafter "FECA"), and for the detection, investigation, and institution of enforcement actions arising from violations of FECA. The FEC was also responsible for collecting and making available to the public specific and accurate information concerning the identity of contributors to federal candidates such as Henry Espy.

13. On or before January 5, 1993, Henry Espy, not named as a defendant in this Indictment, publicly announced his candidacy for the Democratic Party nomination for the United States Congress from the State of Mississippi in a special primary election.

14. Henry Espy sought election to become the Democratic nominee for the Mississippi Congressional District seat being vacated by his brother, Michael Espy, when Secretary of Agriculture Michael Espy resigned his Congressional seat to accept the position of Secretary of Agriculture.

15. On or about March 30, 1993, Henry Espy lost the special primary election for Congress. As a result of Henry Espy's unsuccessful campaign for the

Democratic Party nomination, campaign debts were incurred. By in or about March 1994, the campaign debt was approximately $120,000.

16. The Henry Espy for Congress Committee was registered as the principal campaign committee for Henry Espy with the FEC and was designated and authorized by Henry Espy, pursuant to FECA, to receive contributions and make expenditures in connection with his 1993 candidacy for the United States Congress. The Henry Espy for Congress Committee was subject to the reporting provisions and the campaign financing limitations of FECA.

17. The Henry Espy for Congress Committee was required under FECA, specifically, Title 2 United States Code §434, to file periodic reports with the FEC, which reports were required to reflect the true identities of all individuals and entities who contributed in excess of $200 to support the candidacy of Henry Espy in any given calendar year.

18. FECA, namely Title 2 United States Code §441b, prohibited entirely and rendered unlawful contributions by corporations, whether directly or indirectly, in connection with the campaign of a candidate for the United States Congress.

19. FECA, namely Title 2 United States Code, §441f, prohibited entirely and rendered unlawful the making of a contribution in the name of another person, including

contributions made by individuals who are reimbursed for such contributions.

20. The violations of FECA alleged herein related to the making of contributions that aggregated more than $2,000 during the calendar year 1994.

IV. THE SCHEME TO DEFRAUD

21. From in or about March 1994 through in or about June 1994, in the District of Columbia and elsewhere, defendant SUN-DIAMOND's Senior Corporate Officer X, and James H. Lake, devised and intended to devise a scheme and artifice to defraud and to deprive another, namely, Bozell, Inc. and RLSM, of the intangible right of honest services of James H. Lake, and for obtaining money and property from Bozell, Inc. by, among other things:

A. creating and causing the creation of a false expense report seeking reimbursement from Bozell, Inc. of money purportedly expended by James H. Lake for the benefit, and on behalf of defendant SUN-DIAMOND;

B. falsifying and causing the falsification of the financial books and records of Bozell, Inc.; and

C. causing Bozell, Inc. to advance funds for the purpose of concealing an illegal corporate campaign contribution by defendant SUN-DIAMOND to help retire the campaign debt of Henry Espy;

all by means of false and fictitious pretenses, representations, and promises, well-knowing at the time that the pretenses, representations, and promises, when they were made to Bozell, Inc., would be and were false and fictitious.

20. It was a part of the scheme and artifice to defraud that in or about March, 1994 during several conversations:

A. Defendant SUN-DIAMOND's Senior Corporate Officer X told James H. Lake that Secretary of Agriculture Michael Espy wanted help from Senior

Corporate Officer X in raising money to retire Henry Espy's campaign debt. Senior Corporate Officer X solicited James H. Lake's assistance in a scheme to raise approximately $5,000 to help retire the campaign debt of Henry Espy.

B. James H. Lake and Senior Corporate Officer X agreed that they would use $5,000 of defendant SUN-DIAMOND's corporate funds to contribute to the campaign of Henry Espy for Congress, in violation of FECA.

C. James H. Lake agreed to enlist the assistance of four other officers and employees of the District of Columbia office of RLSM to make personal contributions, each in the amount of $1,000.

D. James H. Lake agreed with Senior Corporate Officer X that defendant SUN-DIAMOND corporate funds would be used to reimburse the contributions made in the names of the RLSM employees.

E. After on or about March 1, 1994, James H. Lake agreed with Senior Corporate Officer X that the reimbursement of the campaign contributors would be accomplished by having RLSM bill defendant SUN-DIAMOND for a false and fictitious expense to conceal the contribution by defendant SUN-DIAMOND and the reimbursement to the five campaign contributors, including James H. Lake.

F. James H. Lake and Senior Corporate Officer X agreed that RLSM would bill defendant SUN-DIAMOND for a false and fictitious expense for the purported purchase of a table for defendant SUN-DIAMOND at an annual fund-raising dinner (the "Dinner") held by a the District of Columbia based not-for-profit organization.

G. On or about March 10, 1994, James H. Lake, by virtue of his position and authority at RLSM, created a false and fictitious expense for the Dinner and requested reimbursement from Bozell, Inc. in the amount of $5,000,

thereby creating false and fictitious entries on Bozell, Inc.'s books and records.

H. On or about March 14, 1994, James H. Lake caused Bozell, Inc. to issue a check in the amount of $5,000 as reimbursement to James H. Lake for funds purportedly expended for the Dinner on behalf of RLSM's client, defendant SUN-DIAMOND.

I. From on or about March 3, 1994, until on or about March 18, 1994, James H. Lake solicited four other officers and employees of the District of Columbia office of RLSM to each contribute $1,000 to the Henry Espy for Congress Committee. James H. Lake promised each of these officers and employees that their campaign contributions would be reimbursed. Three of these individuals did as James H. Lake requested; the fourth individual refused.

J. From on or about March 3, 1994, until on or about March 24, 1994, James H. Lake, on behalf of defendant SUN-DIAMOND, reimbursed himself and three officers and employees of the District of Columbia office of RLSM, each in the amount of $1,000, for their campaign contributions to the Henry Espy campaign.

K. In or about March 1994, James H. Lake provided to defendant SUN-DIAMOND Senior Corporate Officer X four checks — one from James H. Lake, and three others from officers and employees of the District of Columbia office of RLSM — each in the amount of $1,000 payable to the Henry Espy for Congress Committee.

L. James H. Lake retained approximately $1,000 of the $5,000 amount reimbursed to him from Bozell, Inc. as a consequence of the submission of a false and fictitious billable expense report.

M. On or about April 26, 1994, James H. Lake, by virtue of his position and authority at RLSM, caused RLSM to bill defendant SUN-DIAMOND $26,162.66,

which included the false and fictitious $5,000 expense for the Dinner.

N. On or about April 27, 1994, defendant SUN-DIAMOND's Senior Corporate Officer X, in his capacity as an officer of defendant SUN-DIAMOND, approved for payment RLSM's invoice containing the $5,000 expense for the Dinner.

O. On or about June 2, 1994, defendant SUN-DIAMOND sent a check for $26,162.66, payable to RLSM, which included defendant SUN-DIAMOND's reimbursement to RLSM for payment of the false and fictitious $5,000 expense for the Dinner which RLSM had earlier reimbursed to James H. Lake.

21. On or about April 1, 1994, in the District of Columbia, defendant SUN-DIAMOND's Senior Corporate Officer X opened a bank account at a District of Columbia bank in the name of: "Henry Espy for Congress." Senior Corporate Officer X had sole signature authority over this bank account. Senior Corporate Officer X deposited and caused to be deposited the four $1,000 checks referenced above to the Henry Espy for Congress account.

22. On or about March 1, 1994, in the District of Columbia and elsewhere, defendant SUN-DIAMOND, acting through its Senior Corporate Officer X, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, knowingly and willfully transmitted and caused to be transmitted in interstate commerce, by means of a wire communication, that is: a telephonic call between defendant SUN-DIAMOND's Senior Corporate Officer X in California and James H. Lake's office at RLSM, in the District of Columbia, writings, signs, signals, pictures and sounds, that is: among other things, a message that Senior Corporate Officer X needed to speak with James H. Lake.

(In violation of Title 18, United States Code, §§ 1343 and 1346, and Title 18, United States Code, § 2)

THE GRAND JURY FURTHER CHARGES:

COUNT FOUR

1. Paragraphs 1 through 21 of Count Three of this Indictment are realleged and incorporated by reference as though set forth in full.

2. On or about March 11, 1994, in the District of Columbia and elsewhere, defendant SUN-DIAMOND, acting through its Senior Corporate Officer X, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, knowingly and willfully transmitted and caused to be transmitted, in interstate commerce, by means of a wire communication, that is: a telephonic communication by computer modem between RLSM, in the District of Columbia, and Bozell, Inc., in Omaha, Nebraska, writings, signs, signals, pictures and sounds, that is: a billable expense report requesting reimbursement for a $5,000 expense for the purchase of a table at the Dinner.

(In violation of Title 18, United States Code, §§ 1343, 1346 and Title 18, United States Code, § 2)

THE GRAND JURY FURTHER CHARGES:

COUNT FIVE

1. Paragraphs 1 through 21 of Count Three of this Indictment are realleged and incorporated by reference as though set forth in full.

2. From in or about March 1994, up to and including in or about April 1994, in the District of Columbia and elsewhere, defendant SUN-DIAMOND, acting through its Senior Corporate Officer X, knowingly and willfully made a contribution and expenditure aggregating $2,000 and more in calendar year 1994, in violation of the prohibition against corporate contributions contained in the Federal Election Campaign Act, namely: a contribution and expenditure

totaling $4,000 of corporate assets belonging to defendant SUN-DIAMOND, a California corporation, to the Henry Espy for Congress Committee, a federal political committee, in connection with a primary election held to select a candidate for Representative in Congress.

(In violation of Title 2, United States Code, §§ 441b(a) and 437g(d)(1)(A), and Title 18, United States Code, § 2)

THE GRAND JURY FURTHER CHARGES:

COUNT SIX

1. Paragraphs 1 through 21 of Count Three of this Indictment are realleged and incorporated by reference as though set forth in full.

2. From in or about March 1994, up to and including in or about April 1994, in the District of Columbia and elsewhere, defendant SUN-DIAMOND, acting through its Senior Corporate Officer X, knowingly and willfully made and caused to be made a contribution in the name of another person in violation of the Federal Election Campaign Act, namely: a contribution in the amount of $1,000 of corporate assets belonging to defendant SUN-DIAMOND, a California corporation, in the name of James H. Lake, to the Henry Espy for Congress Committee, a federal political committee, in connection with a primary election held to select a candidate for Representative in Congress.

(In violation of Title 2, United States Code, §§ 441f and 437g(d)(1)(A), and Title 18, United States Code, § 2)

THE GRAND JURY FURTHER CHARGES:

COUNT SEVEN

1. Paragraphs 1 through 21 of Count Three of this Indictment are realleged and incorporated by reference as though set forth in full.

2. From in or about March 1994, up to and including in or about April 1994, in the District of Columbia and elsewhere, defendant SUN-DIAMOND, acting through its Senior Corporate Officer X, knowingly and willfully made and caused to be made a contribution in the name of another person in violation of the Federal Election Campaign Act, namely: a contribution in the amount of $1,000 of corporate assets belonging to defendant SUN-DIAMOND, a California corporation, in the name of A, a person known to the Grand Jury but who is not named as a defendant in this indictment, who was an officer of RLSM, to the Henry Espy for Congress Committee, a federal political committee, in connection with a primary election held to select a candidate for Representative in Congress.

(In violation of Title 2, United States Code, §§ 441f and 437g(d)(1)(A), and Title 18, United States Code, § 2)

THE GRAND JURY FURTHER CHARGES:

COUNT EIGHT

1. Paragraphs 1 through 21 of Count Three of this Indictment are realleged and incorporated by reference as though set forth in full.

2. From in or about March 1994, up to and including in or about April 1994, in the District of Columbia and elsewhere, defendant SUN-DIAMOND, acting through its Senior Corporate Officer X, knowingly and willfully made and caused to be made a contribution in the name of another

person in violation of the Federal Election Campaign Act, namely: a contribution in the amount of $1,000 of corporate assets belonging to defendant SUN-DIAMOND, a California corporation, in the name of B, a person known to the Grand Jury but who is not named as a defendant in this indictment, who was an officer of RLSM, to the Henry Espy for Congress Committee, a federal political committee, in connection with a primary election held to select a candidate for Representative in Congress.

(In violation of Title 2, United States Code, §§ 441f and 437g(d)(1)(A), and Title 18, United States Code, § 2)

THE GRAND JURY FURTHER CHARGES:

COUNT NINE

1. Paragraphs 1 through 21 of Count Three of this Indictment are realleged and incorporated by reference as though set forth in full.

2. From in or about March 1994, up to and including in or about April 1994, in the District of Columbia and elsewhere, defendant SUN-DIAMOND, acting through its Senior Corporate Officer X, knowingly and willfully made and caused to be made a contribution in the name of another person in violation of the Federal Election Campaign Act, namely: a contribution in the amount of $1,000 of corporate assets belonging to defendant SUN-DIAMOND, a California corporation, in the name of C, a person known to the Grand Jury but who is not named as a defendant in this indictment, who was an officer of RLSM, to the Henry Espy for Congress Committee, a federal political committee, in connection with a primary election held to select a candidate for Representative in Congress.

(In violation of Title 2, United States Code, §§ 441f and 437g(d)(1)(A), and Title 18, United States Code, § 2)

A TRUE BILL:

Foreperson
Grand Jury 95-1
June 13, 1996